DEPARTMENT OF STATE REVENUE

LETTER OF FINDNGS

NUMBER 97-0008

INTERNATIONAL FUEL TAX AGREEMENT
FOR THE PERIOD 19 3–95

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ISSUES

I. International Fuel Tax Agreement ("IFTA")—Imposition of Tax—Audited Total Miles—Audit Methodology

Tax Procedure—Protests—Burden of Proof

Authority: IC § 6-8.1-3-14(b) (1988 and 1993); *State v. Huffman*, 643 N.E.2d 899 (Ind. 1994); *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751 (Ind. Ct. App. 1991); *Porter Mem'l Hosp. v. Malak*, 484 N.E.2d 54 (Ind. Ct. App. 1985); *Canal Square Ltd. Partnership v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801 (Ind. Tax Ct. 1998); *Longmire v. Indiana Dep't of State Revenue*, 638 N.E.2d 894 (Ind. Tax Ct. 1994); *Bullock v. Foley Bros. Dry Goods Corp.*, 802 S.W.2d 835 (Tex. App. 1990); IFTA art. XVII, § G (1993); IFTA Procedures Manual art. VI, § A.1 and -.3 (1993); IFTA Audit Manual art. VII, § K.3 (1993)

The taxpayer argues that the samples of its fleet that the field auditors audited were too small.

II. IFTA—Imposition of Tax—Audited IFTA Jurisdiction Miles—Audit Methodology

IFTA/Tax Administration—Alleged Audit Bias

Authority: IND. R. EVID. 201(a)(2); *Liteky v. United States*, 114 S.Ct. 1147 (U.S. 1994); *Bethel Conservative Mennonite Church v. C.I.R.*, 746 F.2d 388 (7th Cir. 1984); *In re J. P. Linahan, Inc.*, 138 F.2d 650 (2d Cir. 1943); *Underwood v. Fairbanks North Star Borough*, 674 P.2d 785 (Alaska 1983); *Adams v. Harrington*, 14 N.E. 603 (Ind. 1887); *Kahn v. Cundiff*, 533 N.E.2d 164 (Ind. Ct. App.), *aff'd and adopted* 543 N.E.2d 627 (Ind. 1989); *Indiana Liberty Mut. Ins. Co. v. Strate*, 148

N.E. 425 (Ind. App. 1925); *Micheli Contracting Corp. v. New York State Tax Comm'n*, 486 N.Y.S.2d 448 (N.Y. App. Div. 1985); *Ristorante Puglia, Ltd. v. Chu*, 478 N.Y.S.2d 91 (N.Y. App. Div. 1984); *W .T. Grant Co. v. Joseph*, 159 N.Y.S.2d 150 (N.Y. App. Div. 1957); *Ohio Fast Freight, Inc. v. Porterfield*, 278 N.E.2d 361 (Ohio 1972); *Midwest Transfer Co. v. Porterfield*, 235 N.E.2d 511 (Ohio 1968); *National Freight, Inc. v. Limbach*, 1993 Ohio App. LEXIS 1666 (Ohio Ct. App. Mar. 25, 1993); 49 C.F.R. §§ 395.3 and 395.8 (1993-2001); IFTA arts. I § K, and V § H (1993); IFTA Procedures Manual art. VI § A.3 (1993); IFTA Audit Manual arts. II § E and VII § K.3 (1993); Code of Judicial Conduct Canon 4E(1)(a) (1993); CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 1, § 220.02 and -.04 (Auditing Standards Bd., American Inst. of Certified Pub. Accountants 1972 and 2001)

The taxpayer asserts that the error factors the auditors used to compute audited IFTA jurisdiction miles were too large because the auditors failed to use any audited mileages that were less than those the taxpayer reported on its IFTA returns. The taxpayer also submits that the auditors made errors in reconstructing the routing of certain vehicles. Lastly, the taxpayer contends that the methodology the field auditors used to audit total IFTA jurisdiction miles proves bias in the Department's favor in conducting the audit.

III. IFTA—Credits Against Tax—Disallowed Excess Tax-Paid Fuel Credit—Audit Methodology

Authority: IC § 6-6-4.1-24(a) (1988 and Supp. 1992; 1993); *Kahn v. Cundiff*, 533 N.E.2d 164 (Ind. Ct. App.), *aff'd and adopted* 543 N.E.2d 627 (Ind. 1989); IFTA arts. III § C and VII §§ B to D (1993); IFTA Procedures Manual arts. II § A and VI § A.3 (1993); IFTA Audit Manual arts. V §§ B. 2 and B.2.a and VII § A (1993)

The taxpayer contends that the field auditors should have used a sampling rather than conducting a census of the taxpayer's tax-paid fuel receipts.

IV. IFTA—Credits Against Tax—(4th Quarter 1994 and 1st Quarter 1995 only)—Disallowed Excess Tax-Paid Fuel Credit—Reallocation from Florida to Correct Jurisdictions

Authority: IC § 6-6-4.1-24(a) (1988 and Supp. 1992; 1993); IFTA arts. III § C and VII §§ B to D (1993); IFTA Procedures Manual arts. II § A and VI § A.3 (1993); IFTA Audit Manual arts. V §§ B.2 and B.2.a (1993)

The taxpayer argues that the auditors should allocate certain tax-paid fuel receipts to IFTA member jurisdictions other than Florida.

V. IFTA—Credits Against Tax (All Test Quarters)—Disallowed Excess Tax-Paid Fuel Credit—Census Population Adjustments—After-Discovered On-Road Fuel Purchase Receipts and Incorrect Auditor Data Entries

Authority: IC § 6-6-4.1-24(a) (1988 and Supp. 1992; 1993); IFTA arts. III § C and VII §§ B to D (1993); IFTA Procedures Manual arts. II § A and VI § A.3 (1993); IFTA Audit Manual arts. V §§ B.2 and B.2.a (1993)

The taxpayer asserts that the auditors should add certain on-road fuel purchase receipts the taxpayer discovered after the original audit to the census population and to correct certain data entry errors they allegedly made.

VI. IFTA/Tax Administration—Negligence Penalty

Authority: IC §§ 6-6-4.1-23(b) and -8.1-10-2.1(d) (1988 and Supp. 1992; 1993); 45 IAC § 15-11-2(b) and (c) (1988 and 1992)

The taxpayer submits that the Department should waive the negligence penalty assessed against the taxpayer.

STATEMENT OF FACTS

A. INTRODUCTION

1. The Taxpayer/Licensee, Its Status Under IFTA and Its Fleet

During calendar years 1993-95 ("the audit period") the taxpayer, a corporation, was a common motor carrier. The taxpayer conducted operations in almost all of the forty-eight contiguous states of the United States during the audit period, but the original field and supplemental audits indicate that the bulk of the taxpayer's miles traveled were accrued east of the Mississippi River. It operated a mixed fleet of owned and leased diesel-fueled road tractors. The taxpayer owned from twelve hundred to fifteen hundred road tractors and leased another two hundred fifty to three hundred from owner-operators, for a combined fleet ranging from fourteen hundred fifty to eighteen hundred road tractors in operation during the audit period.

The taxpayer was incorporated, and during the audit period had its principal place of business, in New Jersey. However, throughout the audit period it held a license from this Department under the International Fuel Tax Agreement (February 1993) (superseded January 1996, effective July 1, 1998, rev. Jan. 2002) (hereinafter "IFTA"). The taxpayer was entitled to apply for an IFTA license from Indiana by virtue of former IFTA article V, § H, which allowed a person based in a non-member jurisdiction to apply to any member jurisdiction in which it operated. New Jersey was not an IFTA member jurisdiction at any time during the audit period, but Indiana was a member throughout those years. The taxpayer (hereinafter also referred to as "the licensee") had a terminal in Indiana until the first quarter of 1995 and operated on Indiana's highways during all three years of the audit period. The taxpayer was therefore entitled to apply for and receive from

this Department an IFTA license that, once issued, made Indiana the taxpayer's base jurisdiction for purposes of any IFTA audit. *See id.* art. V., § H (requiring such an applicant to agree to make operational records available in the licensing jurisdiction for audit or to pay that jurisdiction's auditors' reasonable per diem travel expenses for an audit conducted outside the jurisdiction). All of the tractors were "qualified motor vehicles" as former IFTA article I, § K defined that term, making their fuel consumption subject to IFTA.

2. The Licensee's Mileage Record Keeping System

The auditors proposed to levy the assessment resulting from the field audit for two reasons. One was their disallowing of credit taken for gallons of fuel on which the taxpayer had reported that it had paid tax owed to an IFTA member jurisdiction at the time of purchase (hereinafter "IFTA jurisdiction tax-paid gallons"). As the Department will discuss below, the auditors reduced that part of the assessment in the supplemental audit, which they conducted while this protest was pending. However, the majority of the proposed assessment in both the original and supplemental audits was the result of the licensee's underreporting the miles its fleets traveled, both in all jurisdictions and in IFTA member jurisdictions. This underreporting was in turn the result of the system the taxpayer used during the audit period to record and report miles traveled.

During the pre-fieldwork preparation phase of the audit the licensee provided the auditors with copies of several computer printouts. These printouts were entitled "Fuel and Mileage Activity Report," "Miles and Gallons Summary by Vehicle" and "Fuel and Mileage Recap by State." The Fuel and Mileage Activity Report was the record that the taxpayer kept during the audit period to document trip detail for individual tractors. The licensee's dispatch and payroll office prepared that report. The dispatch and payroll office would enter into its computer the tractor unit number, origin of the trip, any locations at which fuel was withdrawn from bulk storage or bought, and the destination of the trip. A mileage software program calculated the miles traveled using the "most practical route" option. The taxpayer also used the resulting mileages in the Miles and Gallons Summary by Vehicle and Fuel and Mileage Recap by State reports, and in turn used the latter printout to prepare its IFTA-101 returns during the audit period.

The licensee did not use trip data from any records its drivers maintained during the audit period in preparing those reports. In particular, the taxpayer did not require its drivers to fill out the Individual Vehicle Mileage Report ("IVMR") forms recommended for use under IFTA and the International Registration Plan, or equivalent source records of operations of individual qualified motor vehicles. The only driver-maintained activity record in use during the audit period was a "Driver's Report and Daily Log" ("driver's log") that, as its name implies, was driver-specific rather than vehicle-specific. The top three lines of the driver's log included blanks for the signatures of the driver and any co-driver, the date of the activities, the total miles each driver drove, the total miles traveled and the unit number/s of the tractor/s being operated. Below those lines, the upper left quadrant displayed the horizontal version of the graph grid required by the regulations of the United States Department of Transportation (hereinafter "USDOT") to record driver duty status and the location that any change in that status occurred. The horizontal bar was subdivided into rows for the four duty statuses in which that driver could be engaged during any given twenty-four hours (listed in the left margin as being Off-Duty, Sleeper Berth, Driving and On Duty (Not Driving)). The grid consisted of vertical hash marks for each row in the bar

that divided a twenty-four hour period into fifteen-minute increments. A driver would use this graph to document to the nearest quarter hour the total time spent in a given status that day and the approximate time at which that status changed. Drivers of the sample units were better about completing this part of the log, and ordinarily would document not only the time, but also would note the city and state, at which a change in duty status occurred, thereby incidentally reflecting that driver's general route of travel that day. However, this part of the form was not designed to include, nor did the drivers note, the specific highway/s the driver took between cities.

The upper right corner of the form had boxes in which to record the beginning and ending hubometer readings of the vehicle the driver was operating and the total miles traveled. The right edge included a Fuel and Mileage Section consisting in part of boxes in which the driver could enter up to two unit numbers, the starting date, the starting city and state, the ending date and destination or final city and state reached. The Fuel and Mileage Section also had columns in which the driver could list the state in which s/he was traveling, the highway used and date of use, the beginning speedometer (sic; presumably odometer) reading and fuel purchased. The drivers regularly filled in the graph grid and hubometer readings, but did not consistently fill in the columns for state and route of travel or beginning odometer reading. The licensee therefore could not have used the Driver Daily Logs as a source record for the mileage figures in the printouts. The taxpayer's Fuel Manager admitted to the auditors during their first of two field visits to the taxpayer's headquarters that it had not used the logs to report miles. The auditors also discovered that they were unable to trace the driver's logs back to the Fuel and Mileage Activity Report.

B. THE AUDIT

1. Sampling Methodology and the Auditors' Sampling Decisions

The size of the licensee's combined fleets made it impractical to audit the sum total of its taxable activity (called a "census audit") for the three-year audit period. For that reason, during pre-fieldwork preparation the auditors decided initially to conduct what is called a "sample audit." The procedure used in such an audit is exactly what its name implies. Typically, the auditor/s select from a taxpayer's records for one reporting period of each year of the audit period a sample of each quantifiable category of data that the tax computation formula uses. If any data appears to the auditor/s to be an isolated error of the taxpayer in keeping its records or not to reflect its activity accurately (for example, a seasonal fluctuation), the auditor/s eliminate that data from the sample and, if appropriate, replace it with other selected data in the same category and period. The sum of the sampled data is then divided into the number for the same data and period as reported on the tax return or supporting schedule/s for that period. The resulting quotient is an "error factor" that represents the estimated difference of the activity that actually occurred from the activity the taxpayer reported. The auditor/s then use that error factor as a multiplier, the multiplicand being the figure for the same category reported on the return or supporting schedule/s for each period of the year that was not sampled. The product of this latter computation is the audited/adjusted figure for that category and period, which the auditor/s then insert into the computation formula. The auditor/s then apply this formula to all of the audited/adjusted figures arrived at for that reporting period to compute the audited tax liability for that period and to propose an assessment to the taxpayer in that amount. Using this procedure the present auditors, as previously noted, audited for and adjusted three kinds of data.

These categories were total miles traveled in IFTA and non-IFTA jurisdictions ("audited total miles"); total miles traveled in each IFTA jurisdiction ("audited IFTA miles" or "audited IFTA jurisdiction miles"); and gallons of motor fuel on which the licensee had paid tax to an IFTA jurisdiction ("audited IFTA tax-paid gallons").

The auditors selected as their sample reporting periods the fourth quarter of 1993, the third quarter of 1994 and the fourth quarter of 1995. They selected the first two quarters at random and the last one at the request of the licensee, based on its having changed computer systems in that quarter. During pre-fieldwork preparation, using a master list of the taxpayer's powered units and the "Miles and Gallons Summary by Vehicle," the auditors selected as their samples for each test quarter every twentieth to twenty-fifth tractor in operation during that quarter, skipping any such unit if its records indicated it had traveled no or few miles in IFTA member jurisdictions. However, when the auditors made their first field visit to the licensee's New Jersey headquarters, they discovered that during the audit period the drivers of the selected tractors had not prepared IVMRs or equivalent source records that set out the details of individual trips. This fact necessarily forced the auditors to review the drivers' logs and use them as source mileage records instead. In the case of some units these logs were missing or illegible. Where such was the case, the auditors reviewed the records of other units and substituted tractors into the samples that had more complete and legible driver's logs than the ones that were not auditable. The auditors' intent was to select at least twenty (20) units to sample. The samples selected, as ultimately revised, totaled twenty-one (21) tractors for the fourth quarter of 1993, thirty-two (32) tractors for the third quarter of 1994 and twenty-three (23) tractors for the fourth quarter of 1995. (The auditors drew no distinctions between owned and leased tractors in the samples as ultimately constituted.) However, the taxpayer's Fuel Manager objected to the auditors at least twice about what she characterized as the large sizes of these samples.

2. The Auditing of Total Miles and Total IFTA Jurisdiction Miles

a. Audited Miles Data Entry and Database Creation

As previously mentioned above, the auditors were unable to trace the drivers' logs back to the taxpayer's Fuel and Mileage Activity Report. The auditors therefore used a mileage calculation software program (different from the one the taxpayer had used) to compute the "most practical route" and corresponding mileages between the locations documented on the graph grids of the sample units' drivers' logs. They then entered these mileage figures, together with the mileages derivable from such routing information as was recorded in the Fuel and Mileage Sections of the few driver's logs on which it appeared, into their auditing software. The auditors used these data entries to create databases of audited total miles and audited IFTA miles traveled in each IFTA member jurisdiction in which the licensee had operated for each sample quarter. The auditors entered into each database the greater of the mileage figure they had audited from the driver's logs or that the taxpayer had reported on the "Miles and Gallons Summary by Vehicle," and thus on the IFTA-101 return. (Where there was no driver's log, or the auditors could not determine an audited miles figure from an available log, for a particular tractor, they accepted the reported miles figure.) The auditors had two reasons for using the greater of audited or reported miles. The first was that it took a minimum number of miles to drive a given route between two points (whether the auditors' software or, less frequently, the driver's log specified the route). If the

taxpayer reported a mileage figure for that route that was less than that minimum, the auditors presumed that the reported figure had been impossible to achieve and was therefore wrong, and they increased the audited mileage to, but not above, the minimum. The second reason applied where a reported mileage exceeded the minimum. In that situation the logs did not justify an audited miles figure that was less than the reported miles because, with rare exceptions, the logs did not identify the precise roads on which the driver had traveled. The auditors therefore had no, or insufficient, evidence to support reducing the reported miles figure on the theory that a routing, and by extension a reporting, error had been made.

The auditors had to enter more mileage data into the audited IFTA jurisdiction miles database for 1994 and 1995 than they did for 1993, both as a result of the larger sample sizes and the entry of several states in which the taxpayer operated into IFTA during the latter two years. Florida, Illinois, Louisiana, Mississippi, Oregon and Tennessee joined in 1994, and New Mexico, Ohio and Texas joined in 1995. (Almost 25 percent of the miles that the taxpayer reported during the audit period were driven in Texas.) As a result, while the auditors audited miles for only 20 IFTA jurisdictions for 1993, they did so for 26 IFTA jurisdictions for 1994 and 29 IFTA jurisdictions for 1995. The addition of these new jurisdictions necessarily increased the licensee's audited IFTA jurisdiction miles driven in 1994 and 1995.

b. Computation of Audited Miles and Miles Error Factors

Once the auditors completed entering the mileage data for the revised samples, they then printed summaries for each unit of audited total miles and audited IFTA miles in each member jurisdiction in which the tractor had operated during the sample quarter. The auditors then compared each unit's audited total miles or audited IFTA jurisdiction miles figure to its reported total miles or reported IFTA jurisdiction miles figure, respectively, and again used the higher of audited or reported miles as the tractor's audited miles figure. The auditors then added the audited mileages per tractor to arrive at figures for each quarter's sample for audited total miles and audited IFTA miles for each jurisdiction in which the taxpayer had operated during that quarter. Lastly, the auditors divided the sample's audited total miles or audited IFTA jurisdiction miles into the sample's reported total miles or reported IFTA jurisdiction miles, respectively, to arrive at error factors for total miles and for miles for each IFTA jurisdiction in which the licensee had operated during that quarter. The resulting error factors indicated increases of audited total miles over reported total miles of 6.8 percent for 1993, 7.3 percent for 1994, 7.4 percent for 1995 and an approximate average variance of 7.2 percent for the audit period. There were also increases of audited total IFTA jurisdiction miles over reported total IFTA jurisdiction miles. For 1993 the increase ranged from 0.0 percent for Colorado and Nevada to 40.2 percent for Arizona and an approximate average increase of 9.5 percent in all jurisdictions that were IFTA members that year and in which the sample units for that year operated. In 1994 the increase ranged from 0.0 percent for Minnesota, Nevada, Oregon and Wisconsin to 77.1 percent for Missouri and an approximate average increase of 17.0 percent in all jurisdictions that were IFTA members that year and in which the sample units for that year operated. For 1995 the increase ranged from 0.0 percent for Nevada to 62.7 percent for Mississippi and an average increase of 15.3 percent in all jurisdictions that were IFTA members that year and in which the sample units for that year operated. (The auditors did not project error factors for the third quarter of 1994 for Idaho, Utah or Washington. Those factors were either unusually high or low

because of the relatively few miles the licensee's tractors had traveled in those states in that sample quarter. The auditors treated the audited miles for those jurisdictions as isolated errors and used those miles only in the quarter in which they were discovered.)

3. The Auditing of Tax-Paid Fuel, Including the Supplemental Audit

a. The Decision to Conduct a Census Audit of Tax-Paid Fuel in the Sample Quarters

The auditors also discovered during their first field visit that the taxpayer kept its fuel records in envelopes labeled by jurisdiction rather than by tractor. They totaled fuel for all states to obtain audited total gallons figures for the sample quarters. The audited total gallons figures each turned out to be less than the respective reported total gallons figures for those quarters. The auditors therefore left the latter figures unchanged and focused on IFTA jurisdiction tax-paid gallons. Only ten days had been allocated for their first field visit. Considering this circumstance, the auditors decided that sorting through the jurisdiction envelopes to match fuel invoices to the various sample units would be too cumbersome and time-consuming to justify auditing fuel on a sample basis. They therefore modified their pre-fieldwork decision to conduct a sample audit, but solely as to tax-paid fuel. The auditors decided instead to conduct a full census audit of tax-paid fuel consumed in the sample quarters. However, they would still use the resulting data to calculate tax-paid fuel error factors for each IFTA jurisdiction in which the licensee had operated in that quarter, which they then would project to each non-sample quarter in that year.

b. The Isolated Errors, Including the Reallocation of Florida Tax-Paid Fuel for 1994-95

However, the major part of the auditors' adjustment to tax-paid fuel was the result not of their use of census methodology or error factors, but of isolated errors in non-sample quarters. The largest such adjustment the auditors made, and the only one in issue in this protest, was to tax-paid fuel for Florida. The auditors, in examining the taxpayer's returns, had noticed that reported Florida tax-paid fuel had substantially increased in the fourth quarter of 1994 and the first quarter of 1995 and decided to investigate. They arrived at audited Florida tax-paid fuel for these two quarters by totaling the gallons of fuel located in three bulk storage terminals the licensee maintained in the state and the gallons of fuel that the taxpayer's drivers had bought while traveling in Florida ("on-road purchases"). Cash receipts the vendors gave to the drivers and the summaries of two third-party reporting services evidenced the on-road purchases. The licensee had first started to use one of these services in December 1994. The taxpayer later discovered in preparing for its protest hearing that an error had occurred in implementing that new service. Specifically, that service's reports to the licensee did not include a jurisdiction code identifying the appropriate state in which a driver had made an on-road fuel purchase. When the taxpayer initially captured and transferred fuel data from the new service's reports to the licensee's internal tax reporting software, that software did not identify the states of purchase and, for reasons unknown, misallocated the purchases to Florida instead. However, neither the licensee nor the auditors were aware of these occurrences or the reason for them during the original audit.

The auditors found at that time that in the fourth quarter of 1994, reported Florida tax-paid gallons exceeded audited Florida tax-paid gallons by approximately 41.0 percent, while in the

first quarter of 1995 reported Florida tax-paid gallons exceeded audited Florida tax-paid gallons by approximately 115.5 percent. To arrive at the audited Florida tax-paid fuel credits for these quarters, instead of using the reported Florida tax-paid gallons figures, the auditors multiplied the lower audited Florida tax-paid gallons figures by the applicable tax rates. This action initially had the effect of disallowing the taxpayer credits or refunds of Florida fuel tax in the mid-five-figure range for the fourth quarter of 1994 and in the low six-figure range for the first quarter of 1995, and generated approximately 34.5 percent of the original assessment. However, in preparing for its protest hearing the licensee discovered the previously described software malfunction and, through a combination of re-programming its computers and manual labor, identified the correct states in which the tax-paid fuel originally misallocated to Florida had been purchased. At the hearing the taxpayer submitted in evidence two "Reconciliation[s] of Over Reported Florida Tax-Paid Fuel," one each for the fourth quarter of 1994 and the first quarter of 1995. The reconciliations each identified the correct states (both IFTA and non-IFTA) where the licensee purchased tax-paid fuel and the respective number of gallons of such fuel that had been previously misallocated to Florida. The reconciliation for the fourth quarter of 1994 reallocated credit for fuel purchased during that quarter but misallocated to Florida among thirty-four states, seventeen of which were not, and another seventeen of which (including Florida) were, IFTA members. The reconciliation for the first quarter of 1995 reallocated credit for fuel purchased during that quarter but misallocated to Florida among thirty-six states, fifteen of which were not, and another twenty-one (21) of which (including Florida) were, IFTA members. The auditors reviewed and accepted this information, except for Wyoming in the fourth quarter of 1994, where the auditors used the gallons shown on the taxpayer's "Fuel and Mileage Recap by State from 10/01/94 thru 12/31/94." With this one exception, the auditors used the information on the reconciliations in the supplemental audit to adjust the licensee's respective credits for tax-paid fuel with the appropriate IFTA member jurisdictions.

The auditors also examined certain additional cash purchase tax-paid fuel invoices the taxpayer provided. They rejected invoices from vendors that were not on the licensee's "Fuel Receipt Vendor Listing," that had already been included in a third-party fuel purchase report or that were illegible but accepted invoices not falling into one or more of these categories. Lastly, the auditors adjusted the tax-paid gallons figures for Louisiana, Missouri and Wyoming for the 1995 test quarter to correct data entry errors they had made. The cumulative effect of the adjustments made to IFTA jurisdiction tax-paid gallons in the supplemental audit was to reduce the combined principal amount of tax in the original Notice of Proposed Assessment for the audit period by approximately13.7 percent. The overwhelming majority of this abatement, approximately 86.4 percent, fell in calendar year 1995, the year in which the auditors had disallowed the larger portion of the Florida tax-paid fuel credit.

4. The Negligence Penalty Assessment

The Department assessed a 10 percent negligence penalty against the taxpayer. The abatement in the supplemental audit of the part of the assessment relating to tax-paid gallons misallocated to Florida proportionately reduced the amount of the penalty. The Department will provide additional information in the Discussions of the issues for which such information is needed.

I. International Fuel Tax Agreement ("IFTA")—Imposition of Tax—Audited Total Miles—Audit Methodology

Tax Procedure—Protests—Burden of Proof

DISCUSSION

The taxpayer argued in its original protest letter that the samples of its fleet that the field auditors audited were too small. However, and contrary to the licensee's argument, the taxpayer's Fuel Manager objected to the auditors at least twice about what she characterized as the large sizes of these samples. The licensee's position on the question of the samples' sizes has therefore been inconsistent over the course of these administrative proceedings. Moreover, the taxpayer's representatives, once they respectively became involved, failed to support the taxpayer's present assertion with further evidence, argument or authority. These latter omissions are the first of several such failures to support the licensee's positions on various issues, so the Department believes it appropriate at this point to discuss the taxpayer's procedural obligations in this matter. Before doing so, however, the Department will discuss the parts of IFTA, the IFTA Procedures Manual (1993), the IFTA Audit Procedures Manual (1993) and the Indiana Code (1988 and 1993) that specified those obligations during the audit period.

As it read then, IC § 6-8.1-3-14(b) stated in relevant part that "if the provisions set forth in [the Base State Fuel Tax A]greement or other agreements [*e.g.*, IFTA] are different from provisions prescribed by an Indiana statute, then the agreement provisions prevail." *Id.* IFTA article XVII, § G states that "[a]dopted procedures shall become a part of this Agreement and shall be placed in writing in the IFTA Procedures Manual." *Id.* Article VI, § A.1 of the latter document in turn states that "[a]ll audits conducted by the member jurisdictions shall be in compliance with the requirements that are established in the Agreement and shall follow the procedures as outlined in the Audit Procedures Manual." *Id*. (*Cf.* IFTA article XIII, § R1330 (1998, rev. Aug. 2000), which states that "[a]udits conducted by member jurisdictions shall be in compliance with all requirements established in the Agreement, Procedures Manual, and Audit Manual." *Id.*)

IFTA Audit Manual article VII, § K.3 (1993) states that "[t]he findings of the base jurisdiction's audit as to the amount of fuel taxes due from any licensee shall be presumed to be the correct amount." *Id*. *Accord,* IC § 6-6-4.1-24(b) (1993) (stating that "[t]he notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid.") IFTA Procedures Manual article VI, § A.3 states in relevant part that "[t]he assessment made by a base jurisdiction … shall be presumed to be correct, and in any case where the validity of the assessment is drawn in question, the burden shall be on the licensee to establish by a fair preponderance of evidence that the assessment is erroneous or excessive." BLACK'S LAW DICTIONARY (7th ed. 1999) defines the term "burden of proof" as a "party's duty to prove a disputed assertion or charge." *Id.* at 190. The burden of proof is two-fold, consisting of both the burden of persuasion and the burden of production. *Porter Mem'l Hosp. v. Malak*, 484 N.E.2d 54, 58 (Ind. Ct. App. 1985) (noting that "burden of proof" is not a precise term, as it can mean both the burdens of persuasion and production).

The terms "burden of production" and "burden of persuasion" have two distinct meanings. *See State v. Huffman*, 643 N.E.2d 899, 900 (Ind. 1994) (stating that there are "two senses" of the term "burden of proof," the burdens of persuasion and production). The burden of production, also referred to as the burden of going forward, is the party's (in tax protests the taxpayer's) "duty to introduce enough evidence on an issue to have the issue decided by the fact-finder." *Id.* In other words, a taxpayer must submit evidence sufficient to establish a prima facie case, i.e., evidence sufficient to establish a given fact and which if not contradicted will remain sufficient to establish that fact. *See Longmire v. Indiana Dep't of State Revenue*, 638 N.E.2d 894, 898 (Ind. Tax Ct. 1994); *Canal Square Ltd. Partnership v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801, 804 (Ind. Tax Ct. 1998). *Cf. Bullock v. Foley Bros. Dry Goods Corp.*, 802 S.W.2d 835, 839 (Tex. App. 1990) (observing, in challenge to state's sales and use tax audit, that comptroller's deficiency determination is prima facie correct and that taxpayer must disprove it with documentation).

In contrast to the burden of production component of the burden of proof, the burden of persuasion is the taxpayer's "duty to convince the fact-finder to view the facts in a way that favors that party. … —Also loosely termed *burden of proof*." BLACK'S LAW DICTIONARY 190 (7th ed. 1999) (emphasis in original.). Some cases have referenced this dual meaning. *See, e.g., Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991) (observing that in criminal cases, the "State carries the ultimate burden of proof, or burden of persuasion").

The present licensee protested that the sizes of the samples were too small. As the Department will discuss in detail under Issues II and III below, the taxpayer submitted as evidence the written opinion of an alleged auditing expert. However, that purported expert opinion does not discuss the subject of sample size. The only other evidence in the record, the assertions of the licensee's Fuel Manager that the samples were too large, contradicts the taxpayer's position. Nor has the licensee submitted any further argument in support of the question of sample size. Accordingly, the taxpayer has failed to sustain its burdens of production, persuasion and proof on this issue.

FINDING

The taxpayer's protest is denied as to this issue.

II. IFTA—Imposition of Tax—Audited IFTA Jurisdiction Miles—Audit Methodology

IFTA/Tax Administration—Alleged Audit Bias

DISCUSSION

A. THE LICENSEE HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF THAT THE IFTA JURISDICTION MILES AUDIT METHODOLOGY WAS INACCURATE.

In the licensee's counsels' initial detailed statement of protest arguments, they asserted to the Audit Division that the auditors' practice of using the higher of audited or reported miles made the resulting audited IFTA jurisdiction miles calculations inaccurate. Counsel have further contended, both in that statement and in later written arguments, that the audited IFTA jurisdiction miles figures calculated also were not based on the "best information available," as IC § 6-6-4.1-24(a) (1988 and Supp. 1992; 1993) requires. They submit that the best information available included audited mileages that fell below, as well as above, the corresponding reported mileages, and that the audits would have been more accurate if the auditors had used both kinds of audited miles. In support of this last proposition the taxpayer's other representative, a tax audit consulting firm, reviewed the driver's logs and prepared a so-called Revised Audit Analysis with three volumes of supporting work papers, one for each year of the audit period. The licensee submitted copies of this Analysis and these workpapers to the Audit Division in the early stages of this protest, which the auditors reviewed and found to be insufficient evidence to support changing their original findings concerning audited IFTA jurisdiction miles. The taxpayer also submitted a second set of the Analysis and workpapers in evidence at the protest hearing before the Legal Division.

After the hearing, at the hearing officer's request, the licensee's counsel also submitted written argument on three additional issues. Specifically, these issues were: 1) whether the Department's auditors' actions had violated generally accepted accounting principles or audit standards; 2) if so, which and how; and 3) what, if any, legal standards governed the methodology the auditors allegedly should have used. In support of their arguments on the first two issues, counsel submitted the written opinion of the alleged auditing expert referred to in the last paragraph of the Discussion of Issue I above. Copies of the allegedly controlling audit standards were attached to that opinion, which essentially reiterated the taxpayer's position as to audited IFTA jurisdiction miles. As to the last issue counsel reiterated its statutory "best information available" argument without being more specific as to what that term means or includes.

The Department views the licensee's argument as having two flaws. First, the "best information available" argument is an attempt by the taxpayer to shift the burden of proof from itself to the Department. IFTA Audit Manual article VII, § K.3 (1993) stated that "[t]he findings of the base jurisdiction's audit as to the amount of fuel taxes due from any licensee shall be presumed to be the correct amount." *Id.* Both IC § 6-6-4.1-24(a) and IFTA Procedures Manual article VI, § A.3 require motor carrier fuel tax auditors to act on the basis of the "best information available." Thus, if the Department's findings are presumptively correct, then they were also presumptively based on the best information available, and the Department therefore does not have the burden of proving this point.

Second, the licensee does not meet its own burden of proof merely by showing that the Department might not have used the best information available in proposing the assessment. IFTA Procedures Manual article VI, § A.3 states that "the [affirmative] burden [of proof] shall be on the licensee to establish by a fair preponderance of evidence that the assessment *is erroneous or excessive*." *Id* (emphasis added). "[I]t was incumbent on the taxpayer 'to show in what manner and to what extent the [assessment] was wrong.' " *Ohio Fast Freight, Inc. v. Porterfield,* 278 N.E.2d 361, 363 (Ohio 1972) (quoting *Midwest Transfer Co. v. Porterfield,* 235

N.E.2d 511, 513 (Ohio 1968), *quoted and followed in National Freight, Inc. v. Limbach*, 1993 Ohio App. LEXIS 1666 at *2 (Ohio Ct. App. Mar. 25, 1993). *Accord, see* IC §§ 6-6-4.1-24(b) and –8.1-5-1(b) (each stating that "[t]he burden of proving that the proposed assessment *is wrong* rests with the person against whom the proposed assessment is made [emphasis added]."). In other words, a taxpayer protesting an audit assessment must prove either that the taxpayer owes no tax at all in addition to that which it had reported and paid previously, or less tax than was assessed, establishing the factual and legal reasons why such is the case.

Part of the auditors' rationale for using the greater of audited or reported miles was that it was impossible to drive between two given points along the "most practical route" in less than the minimum possible number of miles for that route. Thus, part of the licensee's burden of proof was to show the contrary, i.e. that its driver could travel the distance between two given points in less miles than the auditors had concluded was possible, and the specific road/s the driver used to achieve this result. However, the taxpayer's consulting firm completely failed to establish either of these facts in the workpapers supporting its Revised Audit Analysis. Each volume of workpapers begins with a "Miles by State Report" summarizing, by jurisdiction, the miles the consulting firm had concluded that each vehicle the auditors had included in the sample had traveled in that quarter. The Miles by State Report is followed by reports for each sample tractor entitled "Miles Summary for a Tractor Report" and "Routing Detail for a Tractor." The last report simply lists the points between which the unit in question traveled on a given day, but without listing any specific roads traveled or the respective distances between those points. Moreover, the routing detail reports suffer from exactly the same defect as the original driver's logs. Just as the auditors could not trace the driver's logs to the taxpayer's Fuel and Mileage Activity Report, the Department cannot trace the routing detail reports to the miles summary reports and in turn to the Miles by State Report. The Department cannot compare the mileages at which the auditors arrived to distances or roads that the consultant did not document, or determine if the licensee's consulting firm matched those undocumented mileages to the proper jurisdiction and reporting period. It was incumbent on the taxpayer to cite the Department to enough specific examples of lower mileages than those the auditors had found to make it probable, both statistically and evidentially, that the auditors' mileage calculation and matching methodology was wrong. The licensee has wholly failed to do so, and indeed it is unlikely that it could have done so. Distances between municipalities and other geographic facts, such as the existence and location of highways, "are not subject to reasonable dispute in that [they are] … capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." IND. R. EVID. 201(a)(2). It is well-settled evidence law in Indiana that such information is so reliable that a court could judicially note it without proof. *Id. See also, e.g., Indiana Liberty Mut. Ins. Co. v. Strate*, 148 N.E. 425, 426 (Ind. App. 1925) (judicially noting the distance from Vincennes to Indianapolis as being approximately 130 miles) and *Adams v. Harrington*, 14 N.E. 603, 606 (Ind. 1887) (judicially noting the existence and location of a public highway). Such information is every bit as reliable in a tax case as in other disputes. *See Bethel Conservative Mennonite Church v. C.I.R.*, 746 F.2d 388, 392 (7th Cir. 1984) (judicially noting the history of the Mennonite church). The auditors' assumption about there being a minimum required mileage between two stops therefore was perfectly reasonable. It was also a method of audit reasonably calculated to reflect the taxpayer's operation and the taxes due from the taxpayer. *See, e.g., Micheli Contracting Corp. v. New York State Tax Comm'n*, 486 N.Y.S.2d 448, 450 (N.Y. App. Div. 1985) (citing *Ristorante Puglia, Ltd. v. Chu*, 478 N.Y.S.2d

91, 93 (N.Y. App. Div. 1984). *Accord, Underwood v. Fairbanks North Star Borough*, 674 P.2d 785, 788 (Alaska 1983) (quoting *W .T. Grant Co. v. Joseph*, 159 N.Y.S.2d 150, 155-56 (N.Y. App. Div. 1957)).

The other part of the licensee's burden was to prove that the auditors had been wrong to use reported rather than audited miles where the audited miles had exceeded the minimum possible between the two points in question. To do so, the taxpayer would have to prove that it had committed routing errors that had resulted in reporting more miles than had actually been traveled by the respective sample units and on the respective trips in question. The only real way for the licensee to do that was to produce drivers' logs that identified the precise roads on which the respective drivers had traveled, i.e. on which the drivers had filled out the Fuel and Mileage Section described in the discussion of the driver's log form in the Statement of Facts. As discussed there, the overwhelming majority of the drivers did not fill out the Fuel and Mileage Section. The graph grid that most drivers did fill out was inadequate for recording routing information because it was designed not for that purpose, but to document that the driver in question was complying with USDOT safety regulations concerning length of driving time and driver rest. *See generally* 49 C.F.R. § 395.3 (1993-2001) (specifying maximum allowable motor carrier driver driving and minimum rest times) and *id.* § 395.8 (requiring motor carriers to require drivers to maintain duty status records and specifying the contents of those records (including graph grids)). Thus the taxpayer, through its own failure to adequately supervise its drivers' record-keeping activities, failed to create the records that would have substantiated that a driver had traveled more than the minimum possible miles for the route in question but less miles than what the taxpayer had reported. Given the absence of adequate mileage records, the auditors were justified in declining to reduce minimum or higher audited IFTA jurisdiction mileages below the figures the licensee had reported for the same trips. The taxpayer had no or insufficient evidence to support its routing/reporting error theory.

B. THE LICENSEE HAS FAILED TO SUSTAIN ITS BURDEN OF PROOF THAT THE IFTA JURISDICTION MILES AUDIT METHODOLOGY WAS BIASED.

As noted above, the taxpayer's counsel initially asserted to the Audit Division that the auditors' use of the higher of audited or reported miles resulted in inaccurate audited IFTA jurisdiction miles calculations. However, after the protest was transferred to the Legal Division and the protest hearing was held, counsel further asserted to the hearings officer that the use of the higher of audited or reported miles was not only inaccurate, but also evidence that the auditors' methodology was biased. In support of this latter argument counsel quote IFTA Audit Manual article II, § E, which reads as follows:

> In all matters relating to this assignment, an *independence* in mental attitude is to be maintained by the auditor. *The independent auditor must be without bias with respect to the licensee* under audit, since otherwise he/she would lack the impartiality necessary for the dependability of his/her findings. However, independence does not imply the attitude of a prosecutor, but rather a *judicial impartiality that recognizes an obligation to fairness.*

Id (emphases added by counsel). This provision is an adaptation of the parallel Statement on Auditing Standards. CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 1, § 220.02 (Auditing Standards Bd., American Inst. of Certified Pub. Accountants 1972 and 2001). Both provisions speak of "a judicial impartiality," *id.*; however, the taxpayer has provided no explanation of what judicial (and, by extension, auditor) bias and prejudice consist. Accordingly, the Department has been obliged to research, and in ruling on this argument will refer, to legal authorities on judicial bias to the extent that the position and function of an auditor can be analogized to those of a judge.

BLACK'S LAW DICTIONARY (7th ed. 1999) defines "bias" as an inclination or prejudice, *id.* at 153, implying that it is a state of mind of an individual, specific person. The law of judicial bias supports this inference. Code of Judicial Conduct Canon 4E(1)(a) (1993) requires judges to recuse themselves if they have "a *personal* bias or prejudice," *id* (emphasis added). In *Liteky v. United States*, 114 S.Ct. 1147 (U.S. 1994), the leading modern opinion on judicial bias or prejudice, the United States Supreme Court observed that

> [a]s generally used, [bias and prejudice] are pejorative terms, describing *dispositions* that are *never* appropriate. It is common to speak of "personal bias" or "personal prejudice" without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice, and certainly without implying that there is some other "nonpersonal," benign category of those mental states. In a similar vein, one speaks of an individual's "personal preference," without implying that he could also have a "nonpersonal preference."

Id. at 1154 (first emphasis added; second emphasis in original). The Court went on to observe that

> [t]he words [bias and prejudice] connote a favorable or unfavorable *disposition or opinion* that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts).

Id. at 1155 (first emphasis added; remaining emphases in original). Bias and prejudice thus cannot exist without a person to experience and feel them. *Cf.* CODIFICATION OF ACCOUNTING STANDARDS AND PROCEDURES, Statement on Auditing Standards No. 1, § 220.04 (Auditing Standards Bd., American Inst. of Certified Pub. Accountants 1972 and 2001) (stating that "the possession of intrinsic [mental] independence by [an independent auditor] is a matter of *personal quality* ….") (emphasis added).

In contrast, a methodology is generalized, and detached from any specific problem, facts or data to which it might be applied, or to the state of mind of any person/s who created it or who might

apply it. The relevant definition of "methodology" is that of a "*system* of principles, procedures, and practices applied to a particular branch of knowledge." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY at 747, definition 1 (1988) (emphasis added). The relevant definition of "system" in turn is that of "[a] set of interrelated *ideas or principles*." *Id.* at 1175, definition 4 (emphasis added). Ideas and principles, in the senses that these definitions, and by extension the definition of "methodology," use them, are concepts of at least general, and usually universal, applicability. This is not to say that a methodology, such as generally accepted auditing standards or the rules of evidence, may not contain policy choices favoring or disfavoring particular kinds of results or classes of subjects. However, the fact that the creator/s of a methodology made such choices does not make it biased or prejudiced in the legal sense of those words. In creating that methodology, that person or persons had no specific object/s forming the subject of such a state of mind, but were concerned only with general principles. For that reason, the licensee's argument that the *methodology* used in the audits was biased is meaningless.

There is no evidence in this protest of the kind *Liteky* requires for judicial bias or prejudice that proves that the auditors were legally biased or prejudiced against the taxpayer. The licensee has not argued that the auditors' alleged bias or prejudice arose from a source other than the audit, and the evidence indicates that all of their contact with the taxpayer occurred during the audit (including the pre- and post-fieldwork phases). That being the case, to sustain its burden of proof the licensee would have had to produce pervasive evidence of auditor communications with the taxpayer or its employees or other agents, or with third persons (e.g., fuel suppliers) about the taxpayer, indicating "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Liteky*, 114 S.Ct. at 1157. The taxpayer has not done so. The only evidence in the record of even mere auditor impatience with, let alone legal bias or prejudice toward, the licensee, was in the auditors' unilateral setting of a date for the first field visit. However, there is a clear trail of prior letters from the auditors to the taxpayer indicating that the latter was most reluctant to provide the auditors with the necessary records to enable them to complete their pre-fieldwork preparation, or to agree to a date for the first field visit.

The auditors' actions in computing audited IFTA jurisdiction miles were based only on their making an assumption about it taking a minimum number of miles to drive between two points of travel and on the inadequacy of the licensee's records. Both classes of action were completely consistent with the rules of evidence and with the placing of the burden of proof on the taxpayer by IFTA Procedures Manual article VI, § A.3. Neither evidenced any personal legal bias or prejudice against the taxpayer as the previous quotations from *Liteky* describe those words. As was also previously discussed, facts such as distances and highway routes and locations are so readily ascertainable and so far beyond reasonable dispute as to be entitled to judicial notice. If such is the case, it necessarily follows that a judge could not form a bias or prejudice about them. Since IFTA Audit Manual article II, § E requires auditors to exhibit "a judicial impartiality," *id.*, and a judge could not become biased or prejudiced about such facts, it logically follows that the present auditors could not have done so either. As was also previously noted, the auditors' disallowance of audited possible, but less-than-reported, miles was a straightforward matter of lack of substantiating records. The auditors were under no duty to simply accept such alleged mileages at face value. " 'Impartiality is not gullibility.' " *Liteky*, 114 S.Ct. at 1155, quoting *In re J. P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943) (Frank, J.). However, it is to be noted that, despite the licensee's inadequate mileage records, the auditors did not project error factors

for the third quarter of 1994 for Idaho, Utah or Washington, treating the audited miles for those jurisdictions as isolated errors that occurred only in that quarter. This adjustment, combined with those the auditors made in the taxpayer's favor on tax-paid fuel credit (discussed under Issues IV and V below), is evidence that contradicts its claim of auditor bias.

The Department sees no reason, on the basis of the evidence before it, to abate or reduce this assessment on the ground of auditor bias or prejudice. Given the licensee's failure to offer any evidence of the kind required to prove a charge of auditor bias or prejudice, the taxpayer has not made a good faith argument on the merits concerning this subject. Its argument thus not only lacks merit, but it also is frivolous, unreasonable and groundless. *See Kahn v. Cundiff,* 533 N.E.2d 164, 170-71 (Ind. Ct. App.) (defining these terms and discussing them as providing a basis for an award of statutory attorney's fees), *aff'd and adopted* 543 N.E.2d 627, 629 (Ind. 1989).

FINDING

The licensee's protest is denied as to this issue.

III. IFTA—Credits Against Tax—Tax-Paid Fuel Credit—Audit Methodology

DISCUSSION

The taxpayer contends that the auditors used inconsistent methodology in conducting a census of the licensee's tax-paid fuel receipts for its entire fleet during the sample quarters, while using a sample audit approach to audit miles. The taxpayer contends that the field auditors should have used a sampling approach for tax-paid fuel as well, citing the burden to the licensee of producing all the tax-paid fuel receipts necessary to comply with a census audit.

As noted above, IFTA Procedures Manual article VI, § A.3 states that "the [affirmative] burden [of proof] shall be on the licensee to establish by a fair preponderance of evidence that the assessment *is erroneous or excessive.*" *Id* (emphasis added). IFTA article III, § C states that "[a]ll motor fuel acquired that is normally subject to consumption tax is taxable unless proof to the contrary is provided by the licensee." *Id.* In the tax-paid fuel credit context, these provisions imply that to meet its burden of proof, an IFTA licensee must produce documentation that it had already paid tax on the fuel the auditor/s assessed. IFTA has quite specific requirements concerning taxpayers obtaining and maintaining such documentation. IFTA article VII, § B states that

> [i]n order for the licensee to obtain credit for tax-paid retail purchases, a receipt or a credit card receipt must be retained by the licensee showing evidence of such purchases and tax having been paid by the licensee directly to the applicable jurisdiction or at the pump. No member jurisdiction shall require evidence of such purchases beyond what is specified in the IFTA Procedures Manual.

Id. IFTA Procedures Manual article II, § A states that "[i]n order for the licensee to obtain credit for tax paid purchases, a receipt or invoice, a credit card receipt or automated vendor generated invoice or transaction listing must be retained by the licensee showing evidence of such purchases and tax having been paid." IFTA article VII, § C further states that "[i]n order to obtain credit for tax-paid retail purchases, the receipts must identify the motor vehicle into which the motor fuel was placed." IFTA Audit Manual article V, § B.2.a states that

> [t]ax paid purchases must be supported by a receipt, invlice [sic; should read "invoice"], a credit card receipt or automated vendor-generated invoice or transaction listing. ….
>
> O.T.R. [over-the-road] fuel receipts should identify the vehicle by the plate or unit number, since only vehicles identified with the licensee's operation may be reported for mileage or fuel consumption.

Id. Concerning tax-paid bulk fuel, IFTA article VII, § D states in pertinent part that "motor fuels placed into the fuel tank of a qualified motor vehicle from a licensee's own bulk storage, and upon which tax has been paid to the jurisdiction where the bulk fuel is located, shall be considered as tax-paid purchases. The licensee's records must identify the quantity of fuel taken from the licensee's own bulk storage and placed in its qualified motor vehicles." *Id.* The Department interprets this last provision as necessarily implying that the taxpayer in question must have received, and must maintain, a record of tax having been paid on the bulk-purchased fuel to the applicable jurisdiction, either directly or at the pump. *See* IFTA Audit Manual article V, § B.2 (stating that "[t]he licensee must maintain *complete* records, supported by fuel receipts, of all fuel purchases [emphasis added]….").

There is thus no question that an IFTA licensee contending that it already paid tax on part or all the fuel it consumed must produce records documenting that fact to sustain its burden of proof that an assessment of tax on that fuel is wrong. Ordinarily IFTA auditors will use the sample method to review that documentation. The above-quoted provisions from IFTA and its supporting manuals could be read as implying that a full census approach for both sample and non-sample quarters is required, since proof of payment of tax is transaction-specific. An IFTA audit provision indicates the contrary, however. IFTA Audit Manual Article VII, § A states that "*[u]nless the specific situation dictates,* all audits will be conducted on a sampling basis." (Emphasis added.) The provision draws no distinction between or among any aspects of a licensee's operations related to fuel consumption. Sample audits therefore are the norm as much for tax-paid fuel as for any other such aspect.

However, the specific situation in this audit dictated that the auditors conduct a full census audit, rather than a sample audit, of tax-paid fuel for the sample quarters. The taxpayer had organized its tax-paid fuel records by jurisdiction rather than tractor, and the auditors had only a limited amount of time to conduct their first field visit. The licensee does not dispute either of these facts. Reorganizing the records by tractor to conduct a sample audit of tax-paid fuel would have consumed too much of the auditors' restricted field time. Their decision to work with the records as they found them and conduct a full census audit of tax-paid fuel in the sample quarters therefore was reasonable. Any inconsistency in audit methodology or hardship to the taxpayer in

producing the records was the result of its own choices in organizing its records, over which the Department had no control.

Moreover, standing alone, neither the choice of audit methodology nor any resulting requirement that the licensee produce documents, however burdensome to it, is a protestable issue. The taxpayer must prove not that the methodology used, or any alleged inconsistency in its use, caused the licensee hardship in producing the relevant records, but that the resulting assessment *is wrong*, i.e. that the choice of methodology resulted in legal prejudice to the taxpayer. Thus, the only real questions in a protest in which tax-paid fuel audit methodology is an issue are whether the choice or application of methodology resulted in an erroneous denial of credit and assessment of tax. As to choice of audit methodology the Department would emphasize that it is a logical impossibility for the census method, if chosen and correctly applied, to result in an erroneous assessment of tax. A census audit by necessary implication is the most accurate methodology possible since, as IC § 6-6-4.1-24(a) requires, it is based on the "best information available," *id.*, i.e. all of the activity in question. It therefore follows that the only way to prove that a census audit of tax-paid fuel resulted in an erroneous denial of credit and assessment of tax is through proving that the application of the methodology was incorrect. Such proof would include, for example, the auditors having overlooked valid tax-paid fuel receipts or having committed data entry errors concerning any receipts that they accepted as valid.

The present licensee has not sustained its burden of proof that the choice of methodology resulted in an erroneous denial of credit and assessment of tax, and given the auditors' choice of the census method it could not have done so for the reasons set out above. The taxpayer has not submitted any evidence that the auditors omitted any tax-paid fuel receipts. (The licensee itself had initially overlooked certain receipts, as discussed under Issue V below, but it provided them to the auditors when it discovered the receipts during the supplemental audit.) The taxpayer also has not provided any proof that the auditors committed any data entry errors concerning any of the sample quarters except for the three errors found concerning the fourth quarter of 1995, also discussed under Issue V below. Even as to the 1995 test quarter, the licensee has not offered any evidence that those errors were anything other than isolated or that they had a material effect adverse to the taxpayer on the resulting tax-paid fuel credit error factor. Nor does the licensee offer any evidence that the auditors otherwise erred in applying (as distinguished from choosing) the census method. The taxpayer therefore cannot make a good faith argument on the merits concerning tax-paid fuel audit methodology. Its argument thus not only lacks merit, but it also is frivolous, unreasonable and groundless. *See Kahn v. Cundiff*, 533 N.E.2d 164, 170-71 (Ind. Ct. App.) (defining these terms and discussing them as providing a basis for an award of statutory attorney's fees), *aff'd and adopted* 543 N.E.2d 627, 629 (Ind. 1989).

FINDING

The licensee's protest is denied as to this issue.

IV. IFTA—Credits Against Tax—(4th Quarter 1994 and 1st Quarter 1995 only)—Disallowed Excess Tax-Paid Fuel Credit—Reallocation from Florida to Correct Jurisdictions

DISCUSSION

The taxpayer argues that the auditors should reallocate certain tax-paid fuel receipts from Florida to other states, including states that were IFTA members during the quarter in question. As discussed in detail in the Statement of Facts, the original allocation of the gallons to Florida had been the result of a malfunction by the licensee's reporting software. The taxpayer re-programmed its computer, conducted a manual review of its tax-paid fuel records and submitted evidence at the protest hearing of the correct states to which that fuel should have been allocated. The auditors conducted a supplemental audit in which they adopted this evidence except for Wyoming in the fourth quarter of 1994, for which they adopted the gallons shown on the licensee's Fuel and Mileage Recap by State for that quarter.

FINDING

The taxpayer's protest is sustained in part and denied in part as to this issue. The licensee's protest of this issue is sustained as to all jurisdictions and years except for Wyoming in the fourth quarter of 1994, as to which the taxpayer's protest of this issue is denied.

V. IFTA—Credits Against Tax (All Test Quarters)—Disallowed Excess Tax-Paid Fuel Credit—Census Population Adjustments—After-Discovered On-Road Fuel Purchase Receipts and Incorrect Auditor Data Entries

DISCUSSION

As described in the Statement of Facts, during the supplemental audit the licensee discovered certain additional on-road cash purchase tax-paid fuel receipts, all of which it contends should be added to the census population. The taxpayer provided them to the auditors, who reviewed them. They disallowed receipts from vendors that were not on the licensee's "Fuel Receipt Vendor Listing," that had already been included in a third-party fuel purchase report or that were illegible. The licensee has failed to sustain its burden of proof as to those items. However, the auditors also accepted and added to the census population invoices not falling into one or more of these categories. As to these latter invoices the taxpayer has sustained its burden of proof.

The licensee also argued that the auditors made data entry errors concerning tax-paid fuel for Louisiana, Missouri and Wyoming for the 1995 test quarter. The auditors have acknowledged this fact and have corrected these figures in the supplemental audit.

FINDING

The taxpayer's protest is sustained in part and denied in part as to this issue. The licensee's protest of this issue is denied to the extent that the additional receipts it submitted were issued by vendors not on the licensee's "Fuel Receipt Vendor Listing," that had already been included in a third-party fuel purchase report or that were illegible. The protest of this issue is sustained to the extent that the receipts the taxpayer provided do not fall into one or more of the foregoing

categories. The licensee's protest of this issue is also sustained as to the auditors' acknowledged data entry errors of tax-paid fuel for Louisiana, Missouri and Wyoming for the 1995 test quarter.

VI. IFTA/Tax Administration—Negligence Penalty

DISCUSSION

The taxpayer submits that the Department should waive the negligence penalty it assessed against the licensee. It argues that its actions do not constitute "willful neglect" as IC § 6-8.1-10-2.1(d) (1988 and Supp. 1992; 1993) uses that phrase. However, the taxpayer has not cited any other legal authority for the proposition that its record-keeping deficiencies do not constitute "willful neglect." In factual support of its argument for waiver, the licensee does point out that the field audit was its first IFTA audit and that the taxpayer was then undergoing a significant change in its record-keeping personnel. The licensee also notes that it later improved its fuel tax reporting system by installing satellite communication equipment in its fleet tractors. Again, however, the taxpayer has cited no authority to support the propositions that any of these grounds constitute "reasonable cause" to abate the penalty. The licensee has therefore failed to sustain its burdens of persuasion and proof that the penalty should be waived.

FINDING

The taxpayer's protest is denied as to this issue.

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